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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TEODORO SIERRA, Defendant and Appellant.	H024534 (Santa Clara County Super. Ct. No. CC111833)
In re TEODORO SIERRA, on Habeas Corpus.	H025289

Defendant Teodoro Sierra appeals from a judgment entered after he pled nolo contendere with no promises regarding sentencing to charges of first degree burglary, assault with the intent to commit a sexual offense, false imprisonment, and misdemeanor prowling on the private property of another. Defendant also admitted that he had suffered a prior "Strike" conviction and a serious felony prior conviction. Thereafter, the court denied defendant's motion to strike the priors (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497) and sentenced defendant to 17 years in state prison. We appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief which states the case and the facts but raises no specific issues. We

notified defendant of his right to submit written argument in his own behalf within 30 days. There was no response.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we have reviewed the entire record and have concluded that there is no arguable issue on appeal.

WRIT PETITION

In a declaration submitted in support of his petition for a writ of habeas corpus, defendant claims he was deprived of effective assistance of counsel because his Santa Clara County Deputy Public Defender Shelyna Brown told him that the complaint as filed exposed him to a maximum sentence of 21 years in state prison, but if the case went to preliminary hearing, the prosecutor planned to add new charges which would result in a life sentence if a trial resulted in a conviction. She advised him to plead to all the charges before preliminary hearing. Defendant stated he did not want to plead to the assault and false imprisonment counts because he was innocent of those charges. Nevertheless, he pled no contest because he wanted to avoid a life sentence.

However, his attorney on appeal Paul Couenhoven told him there was no possibility that the prosecutor could file new charges which would carry the risk of a life sentence. Defendant stated that if he had known that before, he would never have pled no contest to all the charges.

Couenhoven's declaration stated that at his request, Brown mailed a copy of her case file to him, one page of which contained hand-written notes showing various calculations of sentences, and the following:

> "Note: After Px Δ, poss. strikes added. 459 [burglary] w/intent 261 [rape]-LIFE.
> Prior → 459-460(a) [residential burglary] 7/11/90
> Attempted sexual battery → non-strike alternative
> Problem:
> Δ's prints on window/duct tape found at the scene
> duct tape
> if theft only motive
> 1) Why enter occupied bedroom
> 2) Why put a chair in front of the door

3) Why have duct tape.

459 1º [first degree burglary] w/intent to 261 [rape.] Life Expos [*sic*]
Pix
5/15/01
Romero
After Px → PC 261 [rape] → Life[.]"

Brown's declaration and the record on appeal show that the felony charges were based on defendant's 2:00 a.m. entry through a street side window into the bedroom of an eight-year-old girl on June 1, 2001. A chair had been placed on the ground outside the bedroom window and another chair had been wedged under the knob to keep the door closed. The girl woke up to find defendant standing over her with duct tape in his hands. Defendant put his hand over her mouth and tried to put the duct tape over her mouth, but she struggled, got free, and screamed. Defendant fled. When police arrived they found a piece of duct tape on the girl's bed with hair stuck to it which was similar to the girl's hair. There were latent prints on the duct tape and on the bedroom window which subsequently were determined to belong to defendant. The victim told officers she did not recognize the defendant but she could identify him if she saw him again. During a follow-up interview a few hours later, she positively identified defendant as the assailant from a photo line-up. Twelve hours later, police detained defendant and searched his truck. They found a partially used roll of duct tape in the truck and clothing that matched the victim's description of the clothes the perpetrator was wearing during the assault. Defendant told the police he entered the home to steal because he needed money. He denied any sexual intent and denied trying to put the duct tape over the girl's mouth or putting a chair in front of her bedroom door. Defendant told the probation officer that he used the duct tape to tape the four fingers of each hand to avoid leaving fingerprints, "yet," the probation officer commented, "he could not explain how his fingerprints were found at the scene." Defendant claimed to have picked out the house at random and stated that he was walking home when he saw the bedroom window open. However, he

also stated the victim's home was 10 blocks away from his residence and that he walked by the victim's residence on several occasions on his way to and from work. He claimed he had no knowledge of the inhabitants of the home. At sentencing, the trial court found that defendant "knew before he entered that the eight-year-old girl was a resident of this residence."

Brown stated that the deputy district attorney said he would file attempted kidnapping and attempted rape charges after the preliminary hearing. Brown stated she doubted he could prove an attempted rape, but she thought an attempted kidnapping charge might survive a dismissal motion after the preliminary hearing. She concluded that if defendant went to trial and was convicted of either an attempted kidnapping or attempted rape charge in conjunction with the residential burglary charge, he would receive a life sentence. Brown stated she advised defendant that if he wanted to avoid the risk of a life sentence he should plead to all the charges, knowing that his sentence could be no more than 21 years in state prison. The court actually imposed 17 years: 12 years (double the aggravated six-year term) for assault with intent to commit a sexual offense, 12 years (double the aggravated six-year term) concurrently for the residential burglary, the aggravated six-year term concurrently for the false imprisonment charge, five years consecutively for the prior serious felony conviction, and, concurrently with the state prison commitment, six months in the county jail for the misdemeanor prowling charge.

"To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and . . . . [t]he petition should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citations.] 'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.' [Citation.] We presume the regularity of proceedings that resulted in a final judgment [citation], and, as

stated above, the burden is on the petitioner to establish grounds for his release. [Citations.] [¶] An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC. [Citations.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Denial of the right to effective assistance of counsel is cognizable on habeas corpus whether it was raised on appeal. (*In re Hochberg* (1970) 2 Cal.3d 870, 875.) Where a petition raises an issue of ineffective assistance based on facts outside the record on appeal, the reviewing court should consider the petition for writ of habeas corpus in conjunction with the direct appeal. (*In re Harris* (1993) 5 Cal.4th 813, 828, fn. 7.)

Appellant has the burden of proving inadequacy of trial counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) He must establish that no reasonably competent attorney would have done what defense counsel did *and* that he was prejudiced by defense counsel's conduct, i.e., that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) Defendant must also show that defense counsel's actions could not be explained on the basis of any knowledgeable choice of tactics. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426, fn. 16.)

"The pleading-and plea bargaining-stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel . . . ." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) While a defendant ultimately makes his personal choice whether to accept a plea bargain, "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain. The defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.

[Citations.]" (*Ibid.*) When a defendant shows that his attorney gave him incorrect advice about the risks of going to trial, he has not received the effective assistance to which he is constitutionally entitled. (See *People v. Plager* (1987) 196 Cal.App.3d 1537, 1543; *People v. Brown* (1986) 177 Cal.App.3d 537, 545-546.) In the guilty plea context, defendant must establish "a reasonable probability that, but for counsel's incompetence, [he] would not have pleaded guilty and would have insisted on proceeding to trial. [Citation.]" (*In re Alvernaz*, *supra,* 2 Cal.4th at p. 934.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

In the instant case, counsel's advice was wrong. Only if the prosecution pled and proved that defendant committed forcible sex offenses during the commission of a burglary as provided in Penal Code section 667.61, subdivisions (c) and (e)(2),[1] could defendant have been exposed to an indeterminate term of either 25 years- or 15 years-to-life. The sex offenses listed in the statute include forcible rape, forcible sodomy, and forcible oral copulation. (§ 667.61, subd. (c).) Attempted rape and assault with the intent to commit a sexual offense, are not included in the list of offenses to which the enhancements of section 667.61 may be applied. While the evidence in this case made it almost certain that the prosecutor could prove the commission of a residential burglary, the enhancement would not apply to defendant because the prosecution could not prove that he committed one of the predicate offenses.

Even if defendant was charged with attempted kidnapping for the purpose of committing a sexual offense, he would not be exposed to a life sentence. Kidnapping for the purpose of committing a sexual offense carries a life sentence (§ 209, subd. (b)(1)), but the sentence range for attempted kidnapping for the purpose of committing a sexual

[1] Further statutory references are to the Penal Code unless otherwise stated.

offense is five, seven, or nine years. (§ 664, subd. (a).) Under the Three Strikes law, with the additional charge, we calculate defendant could have faced the following:

Attempted kidnapping with the intent to commit a sexual offense.	10, 14, 18 years (5, 7, 9 (§ 664, subd. (a))) doubled (§ 1170.12, subd. (c)(1)).
Residential burglary, a serious felony (§ 1192.7, subd. (c)(18)).	If consecutive,[2] 2 years, 8 months (1/3 the midterm of two years (§§ 461, subd. 1, 1170.1, subd. (a))) doubled to 2 years, 8 months (§ 1170.12, subd. (c)(1)).
Serious felony prior.	Five years consecutive (§ 667, subd. (a)(1)).
False imprisonment, assault with intent to commit a sexual offense, attempted rape.	Stayed (§ 654; *People v. Latimer* (1993) 5 Cal.4th 1203).
	Total: 18 years +2 years, 8 months +5 years 25 years, 8 months

The incorrect calculation of defendant's potential exposure "constituted a dereliction of [counsel's] duty to ensure that defendant entered his plea with 'full awareness of the relevant circumstances and the likely consequences of his action. [Citation.]' " (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1357.) Defendant claims he was prejudiced because "[t]here is a huge difference between a 25-year-eight month exposure and a life sentence. Any defendant, guilty or not, could well chose [*sic*] to plea

[2] In choosing to sentence defendant concurrently on the burglary, the court stated: "it could be argued, and the Court has read the file, that this may fall under Penal Code Section 654. However, the Court feels because of the multiple criminal objectives, and it's a product of two separate intents, not necessarily does it trigger the provisions of Penal Code Section 654, which would prevent multiple consecutive sentencing. However, on the other hand, the Court finds that the defendant did enter an early plea in this case, and further it arises out of the same operative facts. The Court is going to run Count 1 concurrent with Count 2. The Court selects the aggravated term of 12 years to run concurrent." (See *People v. Mixon* (1990) 225 Cal.App.3d 1471, 1487.)

[*sic*] to avoid the risk of a life sentence. However, if a defendant only faces a 25-year-8-month exposure if he goes to trial, there is little incentive for him to plead to all the charges in exchange for the risk of being sentenced to up to 19 years and 8 months [the sentence recommended by the probation officer]." Defendant claims he never "would have pled had he known there was no risk of a life charge."

The United States Supreme Court has held that to show prejudice when a defendant challenges a guilty plea based on ineffective assistance of counsel, the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. [¶] In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e.g.*, *Evans v. Meyer*, 742 F.2d 371, 375 (CA7 1984) ('It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received'). As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard

for the 'idiosyncrasies of the particular decisionmaker.' [Citation.]" (*Hill v. Lockhart* (1985) 474 U.S. 52, 59-60, fn. omitted (*Hill*).)

Our California Supreme Court has relied on *Hill* in stating: " 'In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain.' [Citation.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 253 (*Resendiz*).)

Defendant claims prejudice and cites *People v. Johnson*, *supra*, 36 Cal.App.4th 1351 for the proposition that counsel's error " 'adversely affected defendant's ability to knowingly, intelligently and voluntarily decide to enter a plea of guilty.' " (*Id*. at p. 1357.) Johnson's trial counsel miscalculated his maximum potential sentence by 11 years. According to Johnson, his maximum sentence was 27 years, not 38 years as his trial counsel stated. By accepting the plea bargain with its 20-year sentence, he saved only seven years, not 18. (*Id*. at p. 1357.) The appellate court found that Johnson was prejudiced because "the failure of defendant's counsel to correctly advise him of his maximum potential sentence was a substantial inducement in his decision to plead nolo contendere. By accepting the plea bargain, defendant believed he may have cut his sentence almost by half, from a potential 38 years to 20, which under any circumstances would be a powerful inducement to plead. Even so, . . . defendant had reservations about the wisdom of entering the plea bargain as was demonstrated by his attempt to withdraw the plea on other grounds." (*Id*. at p. 1358.)

Unlike Johnson, there is no evidence that our defendant "had reservations about the wisdom of entering the plea bargain." He did not claim that trial counsel coerced him into accepting a plea bargain. He did not demonstrate unhappiness with the plea by an

attempt to withdraw the plea on other grounds before sentencing. (*People v. Johnson*, *supra*, 36 Cal.App.4th at p. 1358.) Nor was our defendant deprived as Johnson was of his best argument to have the plea withdrawn by the failure of the special counsel appointed for the motion to withdraw the plea to discover trial counsel's error in calculating the maximum potential sentence. (*Ibid*.) Defendant did not attempt to withdraw his plea in the trial court.

Under the teaching of *Hill*, *supra*, 474 U.S. at pages 59-60, and *Resendiz*, *supra*, 25 Cal.4th at page 254, we find that defendant was not prejudiced by counsel's error. While defendant asserted he would not have pled no contest if given competent advice, this assertion " 'must be corroborated independently by objective evidence.' [Citations.]" (*Id*. at p. 253.)

While trial counsel concedes that she inaccurately computed the maximum potential term, trial counsel did not state that defendant was not amenable to accepting a plea bargain or that she would not have advised defendant to plead to the charges as originally filed if she had known defendant's maximum exposure with the threatened additional charges was 25 years, eight months instead of life. She did not state that there were arguable defenses that might have prevailed at trial.

"In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court also may consider the probable outcome of any trial, to the extent that may be discerned. [Citations.]" (*Resendiz*, *supra*, 25 Cal.4th at p. 254.) Nothing in the declarations or the other evidence in the record indicates how defendant might have been able to avoid conviction or what specific defenses might have been available to him at trial. Under the facts disclosed by the record as stated *ante*, there was no reasonable probability that the outcome would have been more favorable to defendant. From his claim in his declaration that he was innocent on two counts, it appears defendant intended to go to trial asserting that he was innocent of false imprisonment and assault with intent to commit a sexual

offense. Defendant probably would also have added, if the prosecutor made good on his threats, that he was innocent of attempted kidnapping with the intent to commit a sexual offense and attempted rape as well. Defendant did not state that he would deny committing the burglary. This is not a position of strength from which we can predict the outcome of a trial would more likely have been favorable to defendant.

"Based upon our examination of the entire record, petitioner fails, ultimately, to persuade us that it is reasonably probable he would have forgone the distinctly favorable outcome he obtained by pleading, and instead insisted on proceeding to trial, had trial counsel not misadvised him about the [penal] consequences of pleading guilty. [Citations.]" (*Resendiz*, *supra*, 25 Cal.4th at p. 254.)

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.